Nos. 14-556, 14-562, 14-571, and 14-574

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In The
Supreme Court of the United States

JAMES OBERGEFELL, et al.,

Petitioners,

v.

RICHARD HODGES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATE OF MINNESOTA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

In 2013, the Minnesota Legislature legalized same-sex marriage. Minnesota has an interest in ensuring that all of its citizens' lawful marriages are recognized by other states.

SUMMARY OF ARGUMENT

In 1971, the Minnesota Supreme Court held that the refusal to issue a marriage license to a same-sex couple did not violate the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). This Court summarily dismissed the appeal of that decision "for want of a substantial federal question." *Baker v. Nelson*, 409 U.S. 810 (1972).

Our country has changed considerably in the 43 years since the *Baker* decision. A total of 36 states[1]

[1] Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. The status of same-sex marriage in Alabama is currently uncertain. *Compare Searcy v. Strange*, No. 14-0208, 2015 WL 328728 (S.D. Ala. Jan. 23, 2015) *with Ex parte State ex rel. Ala. Policy Inst., et al., Emergency Petition for Writ of Mandamus*, No. 1140460, ___ So.3d ___ (Ala. Mar. 3, 2015), *available at* https://acis.alabama.gov/displaydocs.cfm?no=642402&event=4AN12324A.

now recognize same-sex marriage, and only 13 states[2] – or just one quarter of the country – currently ban same-sex marriage.

This Court has provided substantial guidance since *Baker* regarding the rights of same-sex couples. In the last 19 years, the Court has struck down the Defense of Marriage Act,[3] sodomy statutes,[4] and other laws targeting gay and lesbian individuals.[5] Meanwhile, same-sex couples in Minnesota and elsewhere continue to raise children. Same-sex marriage bans and non-recognition laws "humiliate[] tens of thousands of children now being raised by same-sex couples." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

The evolution of state statutory law and court decisions, as well as principles of fairness, support the Petitioners' position.

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[2] Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas. Courts have struck down same-sex marriage bans in five of these states, but the rulings are currently stayed. *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Jernigan v. Crane*, No. 4:13-cv-00410, 2014 WL 6685391 (E.D. Ark. Nov. 25, 2014); *Campaign for S. Equal. v. Bryant*, No. 3:14-cv-818, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014); *Rosenbrahn v. Daugaard*, No. 4:14-cv-04081, 2014 WL 6386903 (D.S.D. Nov. 14, 2014); *Lawson v. Kelly*, No. 14-0622, 2014 WL 5810215 (W.D. Mo. Nov. 7, 2014).

[3] *United States v. Windsor*, 133 S. Ct. 2675 (2013).

[4] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[5] *Romer v. Evans*, 517 U.S. 620 (1996).

ARGUMENT

I. Evolution Of The Law Regarding Same-Sex Marriage.

A. *Baker v. Nelson*.

In 1971, the Minnesota Supreme Court held that the refusal to issue a marriage license to a same-sex couple did not violate the First, Eighth, Ninth or Fourteenth Amendments to the United States Constitution. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). In *Baker*, a same-sex couple filed an action in Minnesota state court seeking a writ of mandamus requiring a county official to issue a Minnesota marriage license to them. *Id.* at 185. The district court directed the official not to issue them a marriage license. *Id.* The couple appealed, and the Minnesota Supreme Court affirmed. *Id.*

The Minnesota Supreme Court held that Minnesota law prohibited same-sex marriage. *Id.* at 186. The court dismissed the couple's First and Eighth Amendment claims without discussion. *Id.* at 186 n.2. The court rejected the couple's due-process argument for two reasons: (1) it "d[id] not find support for [the argument] in any decisions of the United States Supreme Court"; and (2) based on "[t]he institution of marriage as a union of man and woman, [which] uniquely involve[ed] the procreation and rearing of children within a family" and the status of opposite-sex marriage as a "historic institution . . . more deeply founded than the asserted contemporary

concept of marriage and societal interests for which petitioners contend." *Id.*

With regard to the couple's equal-protection claim, the court held that "the state's classification of persons authorized to marry" was not irrational or invidiously discriminatory. *Id.* at 187. In response to the couple's argument that Minnesota did not require heterosexual couples to have the capacity or intent to procreate in order to marry, *id.*, the court indicated that such a requirement would be "unrealistic" and an unconstitutional invasion of privacy. *Id.* The court concluded that the state's classification of persons authorized to marry may be "theoretically imperfect" but stated that "abstract symmetry is not demanded by the Fourteenth Amendment." *Id.* (citing *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); *Tigner v. Texas*, 310 U.S. 141 (1940); and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)).

The court also found this Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967) to be inapposite. *Loving* invalidated a state law prohibiting interracial marriages based on the equal protection and due process clauses of the Fourteenth Amendment. 388 U.S. at 11-12. The Minnesota Supreme Court distinguished *Loving* because "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Baker*, 191 N.W.2d at 187.

The couple appealed the Minnesota Supreme Court's decision. *Baker v. Nelson*, 409 U.S. 810 (1972). This Court summarily dismissed the appeal "for want of a substantial federal question." *Id.* at 810. The Court's summary dismissal in *Baker* has been relied on by various courts and litigants for the proposition that a state's prohibition of same-sex marriage is constitutional. *See, e.g.*, *DeBoer v. Snyder*, 772 F.3d 388, 400 (6th Cir. 2014); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 870 (8th Cir. 2006); *Conde-Vidal v. Garcia-Padilla*, No. 14-1253, 2014 WL 5361987, at *6 (D.P.R. Oct. 21, 2014); *Merritt v. Attorney Gen.*, No. 13-00215, 2013 WL 6044329, at *2 (M.D. La. Nov. 14, 2013); *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1003 (D. Nev. 2012), *rev'd and remanded sub nom. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005).

The Minnesota Legislature subsequently enacted legislation to explicitly state that marriage was "between a man and a woman." 1977 Minn. Laws ch. 441, § 1.

B. Hawaii Takes A Different Tack.

In 1991, 20 years after *Baker*, same-sex couples in Hawaii challenged the validity of that state's ban on same-sex marriage under the Hawaii Constitution. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 3, 1996). The lower court granted

the state's motion for judgment on the pleadings. *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993).

The Hawaii Supreme Court vacated the order and remanded the case for further proceedings. *Id.* A two-justice plurality of the court held that the state regulated access to marriage on the basis of sex[6] and sex-based classifications were subject to strict scrutiny under the Hawaii Constitution. *Id.* at 60, 67. Following a motion for clarification, a divided court stated that the state would have the burden on remand to demonstrate its prohibition of same-sex marriage "furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." *Id.* at 74.[7]

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[6] The plurality concluded that the sexual orientation of the plaintiffs was "immaterial" because the state allowed gay and lesbian individuals to marry a person of the opposite sex and precluded heterosexuals from marrying someone of the same sex. *Id.* at 53 n.14; *see also id.* at 51 n.11.

[7] Around that same time, the Minnesota Legislature amended the Minnesota Human Rights Act, Minn. Stat. §§ 363.01-.20, to prohibit many forms of discrimination on the basis of sexual orientation or gender identity in employment, housing, education, business, credit, public accommodations, and public services. 1993 Minn. Laws ch. 22. The Legislature reiterated, however, that "[n]othing in this chapter shall be construed to . . . authorize the recognition of or the right of marriage between persons of the same sex." 1993 Minn. Laws ch. 22, § 7.

C. Congress And Minnesota Enact The Defense Of Marriage Act.

In response to this development in Hawaii, "the Defense of Marriage Act" (DOMA) was introduced in Congress. H.R. Rep. 104-664, at 2. Section 2 of DOMA provided that states did not have to recognize same-sex marriages that were validly entered into in another state. *Id.* at 17, 24-25. Section 3 of DOMA made married same-sex couples ineligible for federal rights and benefits. *Id.* at 10, 30. DOMA was signed into law on September 21, 1996. Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

Four months after DOMA's enactment, the U.S. General Accounting Office issued a report concluding that DOMA implicated at least 1,049 federal laws related to, among other things, social security retirement and disability benefits, Medicare and Medicaid, employment rights and benefits, taxation, veterans' benefits, and housing. U.S. Gen. Accounting Office, *No. B-275860, OGC-97-16, Defense of Marriage Act* (1997), *available at* http://www.gao.gov/assets/230/223674.pdf (last visited Mar. 2, 2015).

In 1997, the Minnesota Legislature enacted its own state DOMA. Alongside language that had been in place since 1977 stating that marriage is a civil contract "between a man and a woman," *see infra* at 5, the Legislature provided that marriage may be contracted "only between persons of the opposite sex." 1997 Minn. Laws ch. 203, art. 10, § 1. It also added

same-sex marriage to Minnesota's list of prohibited marriages, *id.* § 2, and provided that "[a] marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in [Minnesota] and contractual rights granted by virtue of the marriage or its termination are unenforceable." *Id.*

Two years later, the Hawaii trial court held that the state's prohibition on same-sex marriage violated the Hawaii Constitution. *Baehr v. Miike*, No. 20371, 1999 WL 35643448, at *1 (Haw. Dec. 9, 1999). The court stayed the injunction pending appeal. *Id.* During the pendency of the appeal, the Hawaiian people ratified a constitutional amendment that authorized the legislature to prohibit same-sex marriage, which the legislature did. *Id.*

D. The Debate Continues Nationwide.

In 1999, the Vermont Supreme Court held that under the Vermont Constitution, same-sex couples "may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry." *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999). In response, the Vermont Legislature enacted a law allowing same-sex couples to establish civil unions with all the same benefits, protections, and responsibilities of marriage. 2000 Vt. Acts & Resolves 91.

In 2003, the Massachusetts Supreme Court held that "deny[ing] the protections, benefits and obligations conferred by civil marriage to two individuals of

the same sex who wish to marry" violated the Massachusetts Constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). The court concluded that the state's same-sex marriage ban did not pass muster even under a rational-basis test, rejecting the state's assertion that prohibiting same-sex marriage furthered its interests in procreation and child-rearing. *Id.* at 961-64.

Immediately after the *Goodridge* decision, two Minnesota state legislators announced their proposal to allow the people of Minnesota to vote on a constitutional amendment prohibiting same-sex marriage. Jim Ragsdale, *State of Their Unions*, ST. PAUL PIONEER PRESS, Jan. 29, 2004, at A8. This attempt and numerous others over the next seven years failed to pass, as did attempts to legalize same-sex marriage. Minnesota Legislative Reference Library, *Same-Sex Marriage in Minnesota*, http://www.leg.state.mn.us/lrl/issues/issues.aspx?issue=gay (last visited Mar. 2, 2015). Meanwhile, the number of states that allowed same-sex marriage continued to increase. 2009 Conn. Pub. Acts No. 09-13; *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (Iowa is a neighboring state to Minnesota, and same-sex couples from Minnesota traveled to Iowa to marry); 2009 N.H. Laws 60; 2009 Vt. Acts & Resolves 33; 2011 N.Y. Laws 749; *see also* 2009 District of Columbia Laws 18-110 (Act 18-248).

E. The Minnesota Debate Moves To The Ballot And The Courts.

In 2011, the Minnesota Legislature enacted legislation proposing to amend the Minnesota Constitution to state that "[o]nly a union of one man and one woman shall be valid or recognized as a marriage in Minnesota." 2011 Minn. Laws ch. 88, § 1. The act provided for the electorate to vote on the proposed constitutional amendment in November 2012. 2011 Minn. Laws ch. 88, § 2.

At the same time, a group of same-sex couples litigated the validity of Minnesota's DOMA. *Benson v. Alverson*, No. 27 CV 10-11697, 2011 WL 863888 (Minn. Dist. Ct. Mar. 7, 2011). The district court dismissed their complaint based on *Baker* and the lack of any Minnesota Supreme Court precedent establishing greater protection for same-sex couples under the Minnesota Constitution. *Id.*

In early 2012, while the constitutional-amendment campaign was ongoing, the Minnesota Court of Appeals reversed the district court's decision. *Benson v. Alverson*, No. A11-811, 2012 WL 171399, at *1 (Minn. App. Jan. 23, 2012), *review denied* (Minn. Apr. 17, 2012). The court held that *Baker* was not binding precedent for claims under the Minnesota Constitution. In addition, the court noted that "since *Baker* was decided in 1971, the United States Supreme Court has issued decisions providing guidance" regarding the "moral disapproval of a class because of sexual orientation." *Id.* at *7. The court remanded the case so the same-sex couples could have the "opportunity to show that MN DOMA is not a reasonable

means to its stated objective – to promote opposite-sex marriages to encourage procreation." *Id.* at *6.

With the matter pending in the Minnesota courts, the voters of Minnesota rejected the proposed constitutional amendment to ban same-sex marriage. Office of the Minnesota Secretary of State, http://minnesotaelectionresults.sos.state.mn.us/Results/AmendmentResultsStatewide/1 (last visited Mar. 2, 2015).

F. Minnesota Legalizes Same-Sex Marriage.

In May 2013, Minnesota legalized same-sex marriage. 2013 Minn. Laws ch. 74.[8] The law went into effect on August 1, 2013. *See* Minn. Stat. § 645.02.[9]

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[8] By 2013, at least 19 municipalities in Minnesota had enacted domestic partnership ordinances, allowing same-sex couples to legally document their relationship. *See* Crystal, Minn., City Code § 340 (2011); Duluth, Minn., Legislative Code ch. 29D (2009); Eagan, Minn., City Code § 2.82 (2012); Eden Prairie, Minn., City Code § 5.73 (2012); Edina, Minn., Code of Ordinances, ch. 2, art. IX (2010); Falcon Heights, Minn., Code of Ordinances, ch. 2, art. VIII (2011); Golden Valley, Minn., City Code § 2.22 (2010); Hopkins, Minn., City Code § 1025 (2011); Maplewood, Minn., City Code § 2-191 (2010); Minneapolis, Minn., Ordinance § 18.200 (1991); Northfield, Minn., Code of Ordinances, ch. 2, art. 1, div. 2 (2012); Red Wing, Minn., City Code § 2.16 (2011); Richfield, Minn., City Code § 120 (2011); Robbinsdale, Minn., City Code § 1015 (2011); Rochester, Minn., Ordinance 81 (2010); Saint Louis Park, Minn., City Code ch. 5 (2011); Saint Paul, Minn., Legislative Code ch. 186 (2009); Shoreview, Minn., Municipal Code § 611; Shorewood, Minn., Ordinance § 110 (2011).

[9] At least 13 states, including Minnesota, have enacted laws to legalize same-sex marriage. *See* 2014 Cal. Legis. Serv. ch. 82 (S.B. 1306); Conn. Gen. Stat. § 46b-20a; Del. Code Ann. tit. 13,

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In the first month after legalization, one-third of marriages in Minnesota were between same-sex couples. Associated Press, *Gay couples claim 1 in 3 Minnesota marriage licenses*, ST. PAUL PIONEER PRESS, Sept. 3, 2013. Within six months, nearly 3,000 same-sex couples were married. Baird Helgeson, *6 months of gay marriage has state confronting profound change*, STARTRIBUNE, Mar. 2, 2014, at A1. Within one year, the number was 3,885. Molly Guthrey, Elizabeth Hernandez & Doug Belden, *A year of same-sex marriage. More love. More happiness.*, ST. PAUL PIONEER PRESS, July 31, 2014, at A1.

G. Federal Courts Repeatedly Strike Down Same-Sex Marriage Laws.

Shortly after Minnesota legalized same-sex marriage, this Court struck down Section 3 of DOMA, which limited federal rights and benefits based on marital status to opposite-sex spouses. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013). The Court concluded that "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their

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§ 101; Haw. Rev. Stat. § 572-1; 750 Ill. Comp. Stat. 5/201; Me. Rev. Stat. tit. 19-A, § 650-A; Md. Code Ann. Fam. Law § 2-201; Minn. Stat. § 517.01; N.H. Rev. Stat. Ann. § 457:1-a; N.Y. Dom. Rel. Law § 10-a; R.I. Gen. Laws § 15-1-1; Vt. Stat. Ann. tit. 15, § 8; Wash. Rev. Code § 26.04.010.

sovereign power, was more than an incidental effect of the federal statute. It was its essence." *Id.* at 2693.

The Court reasoned that DOMA "impose[s] a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages." *Id.*; *see also* Office of the Minnesota Attorney General, *Safe Schools: Secondary Survey Compilation Report 1994-1997*, at 21 (Mar. 1998) (gay and lesbian children stigmatized in schools). It "undermines both the public and private significance of state-sanctioned same-sex marriages" by telling "those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition." *Windsor*, 133 S. Ct. at 2694. "And it humiliates tens of thousands of children now being raised by same-sex couples" by making "it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Id.*

Since *Windsor*, courts have struck down laws in 27 states that prohibit same-sex marriage and refuse to recognize valid same-sex marriages from other states. *See, e.g.*, *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014) (North Carolina, South Carolina, Virginia, and West Virginia); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (Indiana and Wisconsin); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (Alaska, Arizona, Idaho, Montana, Nevada, and Oregon); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (Colorado, Kansas, Oklahoma, Utah, and Wyoming); *Brenner v. Scott*, 999 F. Supp. 2d 1278 (N.D. Fla.

2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (stayed); *Jernigan v. Crane*, No. 4:13-cv-00410, 2014 WL 6685391 (E.D. Ark. Nov. 25, 2014) (stayed); *Campaign for S. Equal. v. Bryant*, No. 3:14-cv-818, 2014 WL 6680570 (S.D. Miss. Nov. 25, 2014) (stayed); *Rosenbrahn v. Daugaard*, No. 4:14-cv-04081, 2014 WL 6386903 (D.S.D. Nov. 14, 2014) (subsequently stayed); *Lawson v. Kelly*, No. 14-0622, 2014 WL 5810215 (W.D. Mo. Nov. 7, 2014) (stayed); *Garden State Equal. v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013); *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013); *Searcy v. Strange*, No. 14-0208, 2015 WL 328728 (S.D. Ala. Jan. 23, 2015); *but see Ex parte State ex rel. Ala. Policy Inst., et al., Emergency Petition for Writ of Mandamus*, No. 1140460, ___ So.3d ___ (Ala. Mar. 3, 2015), *available at* https://acis.alabama.gov/displaydocs.cfm?no=642402&event=4AN12324A.

This Court granted certiorari in the current case after the Sixth Circuit Court of Appeals upheld such laws in Michigan, Ohio, Kentucky, and Tennessee. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

II. The Evolving Law, Including This Court's Recent Decisions, Support The Constitutional Right Of Same-Sex Couples To Marry And To Have Their Marriages Recognized By Other States.

Our society has changed considerably since Congress passed DOMA in 1996 and even more so

since the *Baker* decision 43 years ago. Over 70% of the country's citizens now reside in states that allow same-sex marriage, and only 13 states ban it. Richard Wolf, *Handwriting on the wall for gay marriage*, USA TODAY, Feb. 9, 2015. The evolution of state statutory law and court decisions, as well as societal and fairness considerations, all support the Petitioners' position in this case.

A. *Baker*'s Foundation Does Not Accurately Reflect Modern Society.

1. In the 43 years since *Baker*, this Court has provided substantial guidance supporting the rights of same-sex couples.

In 1971, when the Minnesota Supreme Court addressed same-sex marriage, it "d[id] not find support for [it] in any decisions of the United States Supreme Court." *Baker*, 191 N.W.2d at 186. Indeed, when *Baker* was decided, even gender-based classifications were not subject to heightened scrutiny. *See Craig v. Boren*, 429 U.S. 190 (1976) (adopting heightened scrutiny for gender-based legal distinctions). As stated by the Seventh Circuit Court of Appeals, *Baker* was decided in "the dark ages so far as litigation over discrimination against homosexuals is concerned." *Baskin*, 766 F.3d at 660.[10] This Court has

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[10] This Court recently observed that 40-year-old data cannot be relied upon when "things have changed dramatically" over

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since provided substantial guidance regarding the rights of same-sex couples and gay and lesbian individuals.

In *Romer v. Evans*, this Court struck down a Colorado constitutional amendment, adopted in a statewide referendum, which prohibited state and local governments from protecting individuals from discrimination on the basis of sexual orientation. 517 U.S. 620, 623-24, 635 (1996). The Court reasoned that the amendment "classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else . . . A State cannot so deem a class of persons a stranger to its laws." *Id.* at 635.

This Court later held that a statute criminalizing private, consensual sodomy by persons of the same sex violated the Due Process Clause of the Fourteenth Amendment. *Lawrence v. Texas*, 539 U.S. 558, 562-63, 578 (2003). In so doing, the Court noted that

> for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and

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time and current conditions "tell an entirely different story." *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2625, 2631 (2013).

> which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society. . . . Our obligation is to define the liberty of all, not to mandate our own moral code.

Id. at 571 (quotation omitted). This Court recognized that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. The Court concluded that the constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 559, 574.

As noted above, this Court also recently struck down a portion of DOMA. *Windsor*, 133 S. Ct. at 2682. Since "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal," the Court found it unconstitutional. *Id.* at 2694, 2696.

This Court did not mention *Baker* in any of these decisions. In fact, the Court has never cited *Baker*. Similarly, the Minnesota Supreme Court has only cited its *Baker* decision once in 43 years, and it was for an unrelated purpose. *See State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997) (applying equal protection clause in juvenile sentencing matter). More

recently, the Minnesota Court of Appeals questioned *Baker*'s continued validity in light of subsequent decisions by this Court. *Benson*, 2012 WL 171399, at *7 (citing *Romer*, 517 U.S. at 624, 635); *see also Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1036 (D. Minn. 2012) (concluding that *Baker* did not void a transgender individual's marriage).

Based on the Court's opinions in *Romer*, *Lawrence*, and *Windsor*, the 1971 decision in *Baker* is not controlling precedent. *See Lawrence*, 539 U.S. at 578 (overruling prior U.S. Supreme Court sodomy case due to the serious erosion caused by more recent decisions).

2. The procreation rationale does not support the prohibition of same-sex marriage.

Baker's procreation rationale, 191 N.W.2d at 186 (referring to "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family"), does not reflect modern society. The rearing of children within a family is not unique to opposite-sex marriage. Same-sex couples are raising an estimated 220,000 children in the United States. Gary J. Gates, *LGBT Parenting in the United States*, THE WILLIAMS INSTITUTE, UCLA SCH. OF LAW, 3 (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf (last visited Mar. 2, 2015). The same

source reported that even prior to the legalization of same-sex marriage in Minnesota, over 1,600 same-sex couples in Minnesota were raising children. Gary J. Gates & Abigail M. Cooke, *Minnesota Census Snapshot: 2010*, THE WILLIAMS INSTITUTE, UCLA SCH. OF LAW, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Minnesota_v2.pdf (last visited Mar. 2, 2015).

Indeed, same-sex couples in Minnesota adopted children even before Minnesota legalized same-sex marriage. Since 1951, Minnesota judges have been directed to allow adoptions based upon "the best interests of the child." 1951 Minn. Laws ch. 508. Under this test, Minnesota judges allowed same-sex couples to adopt children even before same-sex marriage was legal in Minnesota. *See, e.g.*, Human Rights Campaign, *Stories of Adoption*, http://www.hrc.org/resources/entry/adoption-stories (discussing 1989 adoption in Minnesota by lesbian couple) (last visited Mar. 2, 2015). Relying, in part, on census data from 2000, a report estimated that over 1,300 adopted children in Minnesota were living with gay or lesbian parents in 2007 – the 12th highest in the country. Gary J. Gates et al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, THE WILLIAMS INSTITUTE, UCLA SCH. OF LAW, 10 (Mar. 2007), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-Macomber-Chambers-Final-Adoption-Report-Mar-2007.pdf (last visited Mar. 2, 2015). As the Court held in *Windsor*, laws that make certain marriages unequal humiliate "tens of thousands of

children now being raised by same-sex couples." 133 S. Ct. at 2694.

B. Married Same-Sex Couples From Minnesota Should Be Able To Cross State Lines Without Their Marriages Disintegrating.

Our society has never been more mobile. People frequently move or travel about the United States for education, work, family, illness, military obligations, and vacation. Opposite-sex married couples can do so freely without worrying about their spousal rights and privileges vanishing. Same-sex couples cannot.

Prior to the legalization of same-sex marriage in Minnesota, over 500 Minnesota statutes provided rights and assigned responsibilities to couples based on marriage. Laura Smidzik, *Yes: In more than 515 ways*, DULUTH NEWS TRIB., Jan. 5, 2009. Prior to 2013, a same-sex couple in Minnesota without a living will or power of attorney could not make health-care or financial decisions for a partner in a medical emergency. They could not count on being allowed to visit a partner in a hospital intensive care unit. They could not control the manner in which a deceased partner was laid to rest. If a partner died without a will, the other would not inherit their estate. They could not cover a partner under their health insurance policy. If one partner was wrongfully killed in a car accident or in a workplace accident, the other could not bring a wrongful death suit or collect workers' compensation

insurance benefits. They could not file joint tax returns, and unlike married couples, one partner had no legal privilege from testifying against the other in court.

Same-sex couples in Minnesota are now allowed to marry and have these rights and responsibilities. But if this Court permits other states not to recognize these Minnesota marriages, the couples will lose their spousal rights if they move from Minnesota, or even temporarily travel outside the state.[11]

For example, if a Minnesota company transfers an opposite-sex spouse to an office located in a non-recognition state, the family can move without any impact on the spouses' legal relationship. But in a same-sex household, the family faces a Hobbesian choice: move and forfeit their marriage and other rights and privileges associated with marriage or refuse the transfer and potentially lose their job or promotion opportunities. These situations also place businesses at a "competitive disadvantage" because it "hamper[s] [their] efforts to recruit and retain the most talented workforce possible." Br. of 23 Employers and Organizations Representing Employers as *Amici Curiae* in Support of Appellees at 1, *Baskin v.*

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[11] The states involved in this case similarly deny same-sex spouses these types of rights and privileges. *See, e.g.*, Br. of Pls.-Appellees at 54 n.7, *Tanco v. Haslam*, 772 F.3d 388 (6th Cir. 2014) (No. 14-5297), 2014 WL 2800979; Br. of Pls.-Appellees at 31 & n.13, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014) (No. 14-1341), 2014 WL 2631744.

Bogan, 766 F.3d 648 (7th Cir. 2014) (Nos. 14-2526 & 14-2386).

Moving to a non-recognition state can also negatively impact the children of same-sex couples. While the children once lived in a home with two married parents, upon moving to a non-recognition state, the legal validity of the family unit is no longer recognized. This "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, 133 S. Ct. at 2694.

When a same-sex spouse serves the country in the military, the couple does not have a choice in their place of domicile. They go where there country sends them. If a spouse is deployed to a non-recognition state, their marital rights and privileges disintegrate. *See, e.g.*, *Tanco v. Haslam*, 7 F. Supp. 3d 759, 764-65, 770 (M.D. Tenn. 2014) (discussing Tennessee's non-recognition of military family's marriage).

Many people travel, or even relocate, to another state to pursue the best medical care for a spouse, a child, or a parent, or to care for an ailing relative. According to U.S. News, Cleveland Clinic and Cincinnati Children's Hospital Medical Center are two top hospitals in the country.[12] But if a same-sex couple

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[12] U.S. News, Health Rankings & Advice, *Cleveland Clinic*, http://health.usnews.com/best-hospitals/area/oh/cleveland-clinic-6410670/rankings (last visited Mar. 2, 2015); U.S. News, Health

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from Minnesota arrives in Ohio for treatment, their marriage disappears. Ohio Rev. Code § 3101.01(C)(2) ("Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state."). Same-sex spouses should not be penalized for seeking top-notch medical care or caring for family in other states.

Even a short car ride can eviscerate a Minnesota marriage. A significant portion of Minnesota's population lives near the state border. The Wisconsin border is a 30-minute drive from Minneapolis. *See* Wis. Const. art. XIII, § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."). Duluth, Minnesota and Superior, Wisconsin are connected by two bridges over Lake Superior. The Red River is all that separates Fargo, North Dakota from Moorhead, Minnesota and Grand Forks, North Dakota from East Grand Forks, Minnesota. *See* N.D. Cent. Code § 14-03-01 ("A spouse refers only to a person of the opposite sex who is a husband or a wife."). Minnesotans cross these borders daily for work, groceries, gas, youth sports, restaurants, worship, and entertainment. All married Minnesotans, not just opposite-sex

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Rankings & Advice, *Cincinnati Children's Hospital Medical Center*, http://health.usnews.com/best-hospitals/area/oh/cincinnati-childrens-hospital-medical-center-6410391/rankings (last visited Mar. 2, 2015).

couples, should be able to do so freely without losing their marital status.

The practical consequences of non-recognition laws are widespread and serious. Our highly mobile society forces same-sex couples to frequently encounter these issues. Like DOMA, non-recognition laws

> single[ ] out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. [It] instructs . . . all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. [It] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom [a] State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the [non-recognition laws are unconstitutional].

Windsor, 133 S. Ct. at 2695-96.

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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